Supreme Court, U.S.
FILED

No. 961115 DEC 17 1996

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARIA VERGARA, - - - - - - - *Petitioner*

versus

COMMONWEALTH OF KENTUCKY, - *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

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December 17, 1996

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

33 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the nature of the medium of videotapes is such that the courts should require more evidence of reliability and authenticity than is currently required by the Commonwealth of Kentucky.

Whether the nature of the medium of videotapes, which subject to intentional or unintentional altering with ease, should require that a chain of custody be established as a prerequisite to admission into evidence.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Kentucky Supreme Court.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARIA VERGARA, - - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Maria Vergara, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court, entered in the above-entitled case on September, 19, 1996.

OPINIONS BELOW

The September 18, 1996 opinion of the Kentucky Supreme Court denying discretionary review, whose judgment is herein sought to be reviewed, is reprinted in the Appendix to this Petition, p. 1a. The prior opinion of the Kentucky Court of Appeals, entered April 5, 1996, was ordered not to be published and is reprinted in the Appendix this Petition, pp. 2a-7a. The Trial Verdict and Judgment of the Hardin Circuit Court, entered October 4, 1994, is reprinted in the Appendix to this Petition, pp. 8a-10a. The order of the Hardin Circuit Court, entered November 10, 1993, de-

nying Petitioner's Motion in Limine, is reprinted in the Appendix to this Petition, p. 11a; Petitioner's Motion in Limine, wherein the federal question was first raised, is reprinted in the Appendix to this Opinion, pp. 12a-15a.

STATEMENT OF JURISDICTION

The Order of the Kentucky Supreme Court denying discretionary review, was entered on September 18, 1996. The jurisdiction of this Court in invoked pursuant to 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Kentucky Rules of Evidence 401, 403, 901, 1001, 1002, 1003, all of which were adopted verbatim from the corresponding Federal Rules of Evidence. The Kentucky rules of Evidence provide as follows:

> KRE 401. Definition of "relevant evidence"
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.

KRE 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

KRE 901. Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

. . . .

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

. . . .

KRE 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

KRE 1002. Requirement of the original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.

KRE 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

This case also involves Kentucky Revised Statute 514.030, which provides as follows:

514.030. Theft by unlawful taking or disposition.

(1) A person is guilty of theft by unlawful taking or disposition when he unlawfully:

(a) Takes or exercises control over movable property of another with intent to deprive him thereof; or

(b) Obtains immovable property or another or any interest therein with intent to benefit himself or another not entitled thereto.

(2) Theft by unlawful taking or disposition is a Class A misdemeanor unless the value of the property is three hundred dollars ($300) or more, or unless the property is a firearm (regardless of the value of the firearm), in which case it is a Class D felony.

STATEMENT OF THE CASE

This is a criminal action. Petitioner, Maria Vergara, was tried on a charge of felony Theft by Unlawful Taking, but the jury returned a verdict of guilty to a misdemeanor Theft by Unlawful Taking and imposed only a fine of $125.00.

Petitioner was employed by Sears, who alleged that she had stolen $541.05 on February 1, 1993. The Commonwealth offered the testimony of three witnesses; they did not witness the alleged theft but only had participated at various stages of installing and reviewing surveillance videotapes. The videotape was introduced and was, in essence, the sole substantive evidence against the petitioner.

The amount of the alleged theft was based upon a daily report of a common fund for February 1, 1993. According to Sears' procedure, three registers were involved with this common fund. The videotape covered two of the registers; it did not have an audio track. The petitioner was not the only employee authorized to handle money at the three registers. Additionally, Sears' procedure provided for the transferring of money between these three registers and others in the store throughout the business day. The employees had been instructed by Sears management to carry the money in their hands or pockets out of sight of the customers.

The videotape showed the petitioner moving money between the two visible registers and it also showed the petitioner removing money from the register and carefully folding it up. Sears alleged that the petitioner stole the money in the waistband of her clothing. There were no eyewitnesses to the alleged theft, and the petitioner was never caught with any stolen funds.

The witnesses testified that the camcorder was installed by one of the security personnel. It was set up to record automatically; no security or other personnel viewed the events as they were being taped. Sears was taping every day and reused old tapes after viewing.

The Sears personnel testified that there were other tapes showing different angles of the same area, including the third register, and tapes taken of the petitioner on other days. However, the other tapes could not be produced by the Sears personnel, and the sole testimony concerning their content was that of the store manager who stated that they contained no exculpatory material.

The camera did not have a date stamp capability; the Sears procedure was to date every tape as it was removed from the camera. However, neither the tape that was introduced into evidence nor its box bore any date. "Original Maria Vergara" was handwritten on the tape.

No chain of custody was maintained over the tape. No safeguards were in place to prevent alteration or switching of the tapes. Sears retained possession of the tape until the day of trial; it was never turned over to law enforcement personnel. It was kept in the manager's office; there were two different managers occupying this office during the period in question. On the day that the petitioner was dismissed because of the money shortages, she asked to view the tape but was denied from doing so. Sears also denied a request by petitioner's counsel to view the tape. When petitioner's counsel eventually was given a copy of that tape, the date March 10, 1993 appeared on the tape, a

large gap exists in the video, and, most importantly, one person appeared in the tape wearing different clothes at different times, despite that fact that the tape purportedly depicted one shift on one day.

The trial court summarily denied petitioner's motion in limine to suppress the introduction of the tape into evidence, and likewise summarily dismissed petitioner's renewal of the objection to the introduction of the videotape at trial. The court did not specifically address the violation of petitioner's due process rights, protected by the Fourteen Amendment to the United States Constitution, which were first raised in the original motion in limine.

The Kentucky Court of Appeals affirmed the jury verdict and the judgment of the trial court. It held that the videotape fell within the definition of "relevant evidence" contained in KRE 401 and was therefore admissible, and that it cannot be said that the trial court abused its discretion in determining that its probative value was not substantially outweighed by the danger of undue prejudice to the petitioner. It held that the videotape is deemed to fall within the rules pertaining to photographs and that the trial court did not abuse its discretion in admitting the videotape into evidence. This holding was based upon the testimony of the Sears employee who installed the camera and testified that he viewed the tape on February 2, 1993, turned it over to the store manager, retrieved the tape from the current store manager and again viewed the tape, determining that the images on the tape remained the same. The Court found that the petitioner's argument that suppression was required because the other video taken on the same day from a different angle was not available for viewing by the jury because it had been reused by Sears, was without merit. The Court found that there was no evidence presented that the second video was destroyed with the intent to deprive the petitioner of its contents.

Accordingly, the evidence in support of the charges again the petitioner was sufficient to put the issues of fact before the jury.

The Kentucky Supreme Court summarily denied petitioner's motion for discretionary review without opinion.

REASONS FOR GRANTING THE WRIT

Virtually every safeguard to ensure the authenticity of the videotape, which constituted the sole direct evidence against the petitioner, was violated or ignored. The decisions of the trial court and the Court of Appeals have decided this question in a way which is contrary to the decisions of at least four United States Courts of Appeal. This Court has never issued an opinion on the requirements for authentication and introduction into evidence of videotapes. Given the burgeoning use of videotapes and other technological advances in the prosecution of criminal cases, this is a special and important reason for the granting of a writ of certiorari.

The courts below relied on the rules regarding the authentication of photographs in admitting the videotape in question. Petitioner recognizes that there is a correlation between photographs and videotapes in that an image of an event or scene is reproduced on a medium. However, the petitioner likewise stresses that there is a significant difference between the two in that a photograph depicts a single view of the subject whereas a videotape depicts a series of literally thousands of views of the subject. The photograph can be compared to its negative to determine whether it had been altered, whereas such a comparison is not readily available with respect each frame of the videotape. The videotape can be easily altered or edited. Videotapes are more akin to audio tapes than photographs in this regard.

Herein lies the linchpin of the distinction between the two media which is crucial to the decision in this case. The courts below permitted admission of the videotape in evidence based upon the testimony of the Sears employee that he retrieved the videotape and viewed it, then viewed it again prior to trial finding that the images on the tape remained the same. However, neither that employee nor any other witness produced by the respondent viewed the entire sequence of events as they were being taped. Furthermore, there was no evidence whatsoever that any safeguards were in place to protect the videotape from alteration or misidentification. A chain of custody was never maintained and the videotape was never in the hands of a public official during the entire time preceding the trial. Notably, the employee also testified that the Sears procedure was to date label the tape when it was removed from the camera, yet the tape that was admitted contained no date identification whatsoever.

The manner in which the lower courts treated the admission of the videotape runs contrary to the treatment of videotapes by at least four United States Courts of Appeals.

In *Mikus* v. *United States*, 433 F.2d 719 (2d Cir. 1970) and *United States* v. *Hobbs*, 403 F.2d 977 (6th Cir. 1968), the accepted, and most commonly employed, method of authentication was established. The personnel in the videotape recordings testified that the videotape accurately portrayed the events in which they participated. Not only was such testimony absent in the case at bar, no government witness even viewed the events as they were being recorded.

The facts in *United States* v. *Taylor*, 530 F.2d 639 (6th Cir. 1976) are more akin to the case at bar. Contact prints from a surveillance camera were admitted after testimony as to the manner in which the film was installed in the

camera, how the camera was activated, the fact that the film was removed immediately after the bank robbery, the chain of possession of the film, and the fact that the film was properly processed and contact prints made from it. As stated, there was no evidence whatsoever of a proper chain of custody in the case at bar. *See also, United States* v. *Richardson*, 764 F.2d 1514 (11th Cir. 1985) (audio tape).

In *United States* v. *Fadayini*, 28 F.3d 1236 (D.C. Cir. 1994) authentication of an automatic teller machine (ATM) tape was accomplished by testimony by bank personnel familiar with operation of the ATM cameras along with time and date imprints on the photographs themselves. In the case at bar, the videotape did not have a time and date on the tape, and furthermore, the Sears employee testified that the tapes were marked with the date when extracted from the camera, yet the videotape admitted against the petitioner did not contain such a marking.

Finally, no presumption of regularity can be attributed to the handling of the videotape prior to trial, *see Galego* v. *United States*, 276 F.2d 914 (9th Cir. 1960), because the videotape was never in the hands of government officials during the interim between the date of taping and the trial.

The respondent presented this evidence to substantiate its allegation that the petitioner stole the money on February 1, 1993, the loss being established by the Sears cash accounting records for that date. The tape was presented as a recording of the shift that the petitioner worked that date. Nevertheless, there was no evidence which met the criteria established above to authenticate the videotape as depicting the activities of the petitioner on February 1, 1993. The contents of the videotape itself provides evidence to the contrary. Another person in this videotape, purportedly of one working shift, is seen wearing two different outfits.

The United States Courts of Appeals have established various tests to establish the authenticity of videotapes versus photographs. None of the tests established by these courts were met in the case at bar. Due to the nature of the medium itself, stricter standards for authentication must be satisfied when videotapes are sought to be introduced. This Honorable Court has never rendered an opinion on such an authentication issue, and with the burgeoning of various types of mechanical and electronic media, such standards should be established to protect the due process rights of the citizens involved.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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Brandenburg, Kentucky 40108
(502) 422-5555 FAX: 422-5556
Counsel for Petitioner

Dated: December 17, 1996

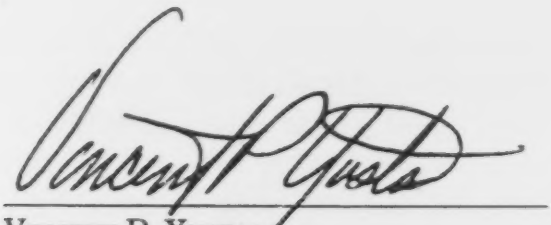
CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of December 1996, a true and accurate copy of the foregoing was mailed, postage pre-paid to the following:

Hon. Jeffrey L. England
Commonwealth Attorney
57 Public Square
P.O. Box 127
Elizabethtown, KY 42701
(502) 765-5912

Attorney General
Commonwealth of Kentucky
Capitol Center
Frankfort, KY 40601
(502) 564-7600

Hon. Hugh W. Roark
Hardin Circuit Judge
100 Public Square
Elizabethtown, KY 42701
(502) 769-5739



VINCENT P. YUSTAS
Counsel for Petitioner

APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of December 2020, a true and accurate copy of the foregoing was mailed, postage prepaid to the following:

Hon. Jeffrey L. Ryan
Commonwealth Attorney
37 Public Square
P.O. Box 927
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(270) 765-2312

Attorney General
Commonwealth of Kentucky
Capitol Annex
Frankfort, KY 40601
(502) 696-5300

Hon. Hugh W. Foote
Hardin County Judge
150 Public Square
Elizabethtown, KY 42701
(270) 765-2100

SUPREME COURT OF KENTUCKY

96-SC-388-D
(94-CA-2452-MR)

MARIA VERGARA - - - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

(Hardin Circuit Court No. 93-CR-127)

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: September 18, 1996.

/s/ Robert F. Stephens
Chief Justice

RENDERED: APRIL 5, 1996; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

94-CA-2452-MR

MARIA VERGARA - - - - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

Appeal From Hardin Circuit Court
Honorable Hugh Roark, Judge
Indictment No. 93-CR-127

OPINION AFFIRMING

BEFORE: DYCHE, JOHNSTONE, and WILHOIT, Judges.

WILHOIT, JUDGE. This is an appeal of the trial verdict and judgment entered by the Hardin Circuit Court on October 5, 1994, finding the appellant guilty of theft by unlawful taking of less than $300 and fining her $125.

In May of 1993, the Hardin County Grand Jury indicted the appellant on the charge of theft by deception over $300 in violation of KRS 514.040. The indictment was subsequently amended to charge her with the crime of theft by unlawful taking over $300, KRS 514.030, a Class D felony. The indictment alleged that, on or about February 1, 1993, the appellant stole cash in excess of $540 from Sears, Roebuck and Company of Elizabethtown, her em-

ployer. Following a trial, the appellant was found guilty of theft by unlawful taking under $300 and fined $125. This appeal followed.

This appeal primarily revolves around the admissibility of a videotape which allegedly shows the appellant stealing cash while on duty at Sears. The appellant submits that admission of the videotape constituted error by the trial court for various reasons. First, the appellant maintains that, because of the video's limited view and lack of audio, it required the jury to speculate in interpreting her actions, making it irrelevant. KRE 402. She also contends that any probative value the tape may have had was substantially outweighed by its potential to mislead the jury. KRE 403. Second, the appellant asserts that the video was not admissible as it was never properly authenticated in conformity with KRE 901 and KRE 1001-1003. Third, the appellant argues that Sears denied her other surveillance videotapes made from different vantage points which would have put the one used at trial into its proper context. The appellant contends that, though she was allowed to show any portion of the video she wished, it remained too misleading and prejudicial under KRE 403 because it could not be placed in its proper context by use of video showing a different angle. Finally, the appellant argues that the verdict was not supported by the evidence presented at trial.

Generally, all relevant evidence is admissible. KRE 402. "Relevant evidence" is defined in KRE 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevancy is traditionally a determination which is left to the discretion of the trial court. *See Green River Elec. Corp.* v. *Nantz,* Ky. App., 894 S.W.2d 643 (1995); *Transit Auth. of River City [TARC]* v. *Vinson,* Ky. App., 703 S.W.2d 482 (1985); *Glens Falls Ins. Co.* v. *Ogden,* Ky., 310 S.W.2d 547 (1958). The trial court may, however, choose to ex-

clude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice. KRE 403. A reviewing court will not disturb the discretionary ruling of a lower court without an abuse of that discretion. *See Green River Elec. Co.* v. *Nantz, supra.* Review of the videotape in question clearly shows that it fell within the definition of "relevant evidence" contained in KRE 401 and was, therefore, admissible. At the same time, it cannot be said that the trial court abused its discretion in determining that its probative value was not substantially outweighed by the danger of undue prejudice to the appellant.

With regard to the authentication issue, videotape evidence is deemed to fall within the rules pertaining to photographs. *See Clay* v. *Commonwealth,* Ky. App., 867 S.W.2d 200, 204 (1993) (citations omitted). The law concerning authentication of photographs was summarized by the Kentucky Supreme Court in *Litton* v. *Commonwealth,* Ky., 597 S.W.2d 616 (1980). The Court in Litton recognized that photos may be admitted as real evidence under certain circumstances, citing 3 *Wigmore on Evidence* § 790 (Chadbourn rev. 1970) which stated

[w]ith later advancements in the art of photography, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition. Thus, even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the 'pictorial testimony' rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which "speaks for itself."

Litton, 597 S.W.2d at 619. The Court also explained that there is no requirement that the mechanical and scientific details be detailed in every case. *Id.* "What is

material is what the rankest box camera operator knows, namely that he 'gets' what he sees." *Id., citing United States* v. *Hobbs,* 403 F.2d 977, 978 (6th Cir. 1968).

In the case at hand, the Commonwealth sought to authenticate the original videotape through the testimony of the Sears employee who installed the covert surveillance camera. He testified concerning the installation of the camera and generally how it functioned. He also testified that he retrieved the videotape recording the events of February 1, 1993, immediately upon discovery that funds were missing, on February 2, 1993. Shortly thereafter, he viewed the tape in search of incriminating evidence. As the tape appeared to incriminate the appellant, the employee turned the tape over to the store manager. He testified that he retrieved the tape from the current store manager for the trial. He again viewed the tape and testified that the images on the tape remained the same. The appellant argues that the date on which the recording was taken was not adequately established by this testimony. There was sufficient evidence to establish the authenticity of the videotape submitted by the Commonwealth. Proper authentication and admission of photographic evidence is a matter resting in the discretion of the trial court. *See Litton* v. *Commonwealth, supra; United States* v. *Taylor,* 530 F.2d 639 (5th Cir. 1976). The trial court did not abuse its discretion in admitting the videotape evidence.

Likewise, the appellant's argument that suppression is required, because other video taken on the same day from a different angle was not available for viewing by the jury because it had been reused by Sears, is without merit. Again, the trial court did not abuse its discretion in allowing introduction of the videotape as evidence. *See Green River Elec. Corp.* v. *Nantz, supra.* The appellant was given the opportunity to show any portion of the video she desired in order to level her defense. See KRE 106. There was no evidence presented that the second video was destroyed with the intent to deprive the appellant of its contents. The record clearly shows that the tape was reused

as a routine practice of Sears. The facts of this case do not require suppression of the videotape in question.

Finally, the appellant asserts that the judgment was not supported by the evidence. The law in Kentucky is well-settled that

[o]n motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence of the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. *Benham,* Ky., 816 S.W.2d 186, 187 (1991). *see also Clay* v. *Commonwealth, supra.* The Commonwealth presented evidence that over $540 was missing from Sears on February 1, 1993, as shown by cash shortages traced to the cash drawer for which the appellant was responsible. The videotape entered as evidence showed the appellant, on two separate occasions, folding money and placing it under her clothing on that same day. Relying on this evidence, it cannot be said that it would be clearly unreasonable for a jury to find the appellant guilty of theft by unlawful taking under $300. Id. The evidence in support of the charges against the appellant was sufficient to put the issues of fact before the jury.

The jury verdict and judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alec G. Stone
Stone Law Office
Brandenburg, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General
Elizabeth A. Myerscough
Assistant Attorney General
Frankfort, KY

HARDIN CIRCUIT COURT

DIVISION II

Indictment No. 93-CR-127

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v.

MARIA VERGARA - - - - - - - - - *Defendant*

TRIAL VERDICT AND JUDGMENT

—Entered October 5, 1994

On the 26th day of September, 1994, the Defendant, Maria Vergara, appeared in open court with her attorney, Alec G. Stone, and the Commenwealth came by attorney, Adam F. Kinney, Assistant Commonwealth's Attorney.

Thereupon came the following jury, to-wit: Brenda S. Hill, Carrell R. Vowels, Barbara J. Rowlett, Timothy W. Jones, Jacquelyn K. DeVeaux, Doyle G. Jordan, Robert G. Jones, Gary Watts, Rosa Thomas, Curtis C. White, Nina D. Buckles, James W. Lowe and Tim G. Morris, who were empaneled and sworn to hear the case upon the Defendant's plea of not guilty.

The testimony and proceedings of this trial were video taped.

Motions and rulings made during the trial are as shown in the official transcript.

The trial progressed, and, after presentation of all of the evidence concerning the Defendant's guilt or innocence, and the Court's instructions and closing arguments, the name of Brenda S. Hill was drawn at random and she was excused as the alternate juror. The jury then retired to deliberate, and, thereafter returned into open Court and returned their initial verdict, viz:

"We, the jury, find the Defendant guilty of Theft by Unlawful Taking less than $300 under Instruction No. 4.

/s/ Curtis C. White, Foreman"

Upon return of the aforementioned verdict of guilty, the Court conducted a sentencing hearing before the jury. Evidence was offered by the Commonwealth relevant to sentencing and the Defendant introduced evidence in mitigation. The Court then instructed the jury on the range of punishment and the jury then retired to consider a recommended sentence for the Defendant. Thereafter, the jury returned into open Court and recommended the following sentence for the Defendant:

"We, the jury, fix the Defendant's punishment for the offense of Theft by Unlawful Taking, money, less than $300 at a fine of one hundred twenty-five dollars ($125.00).

/s/ Curtis C. White, Foreman"

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant is guilty of the crime of Theft by Unlawful Taking, money, less than $300 under KRS 514.030, UOR Code 23299, a Class A misdemeanor, and the Court takes notice of the jury recommendation of a fine of one hundred twenty-five ($125.00) dollars.

The Court inquired of the Defendant and his attorney whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his attorney the opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment,

Having given due consideration to the nature and circumstances of the crime, and to the history, character and condition of the Defendant, and being otherwise sufficiently advised;

THE COURT HEREBY SENTENCES THE DEFENDANT TO: A fine of one hundred twenty-five ($125.00) dollars, to be paid within ninety (90) days of the date of this judgment.

IT IS FURTHER ORDERED that the Defendant pay the costs of the proceedings of $59.00, which includes a $4.00 Bond Fee, within ninety (90) days of the date of this judgment.

IT IS FURTHER ORDERED that the Defendant pay $10.00 to the Crime Victim's Compensation Fund to the Clerk of this Court within ninety (90) days of the date of this judgment.

SO ORDERED this 4th day of October, 1994.

/s/ Hugh Roark
Judge, Hardin Circuit Court
Division II

Tendered By:
/s/ Adam F. Kinney
Adam F. Kinney
Assistant Commonwealth's Attorney

HARDIN CIRCUIT COURT

DIVISION II

Indictment No. 93-CR-127

COMMONWEALTH OF KENTUCKY - - - - - - *Plaintiff*

v.

MARIA VERGARA - - - - - - - - - - *Defendant*

ORDER—Entered November 11, 1993

This action comes before the Court on motion of the Defendant for the Court to suppress the introduction into evidence of a videotape that allegedly shows the Defendant taking money from the cash drawer, and the Court having considered the memorandum of counsel, and being otherwise sufficiently advised,

WHEREFORE, IT IS ORDERED that the motion of the Defendant is OVERRULED.

This 10th day of November, 1993.

/s/ Hugh Roark
Judge, Hardin Circuit Court
Division II

HARDIN CIRCUIT COURT

DIVISION II

Criminal File No. 93-CR-127

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v.

MARIA VERGARA - - - - - - - - - *Defendant*

MEMORANDUM

This memorandum is in support of the Defendant's motion to suppress the videotape of the alleged incident.

There is not much law in Kentucky on the admissibility of videotapes. However, the admissibility should be analogous with that of tape recordings.

It is well settled that the admission of tape recordings at trial rests within the sound discretion of the trial court. *United States* v. *Enright,* 579 F.2d 980 (6th Cir. 1978). That discretion presumes, as a prerequisite to admission, that the tapes be authentic, accurate and trustworthy. *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976); *cert. denied sub nom.* The Defendant asserts that there are serious questions as to the authenticity of the videotape now in question.

At one point in the tape there is an approximately 20 second break with nothing recorded. Later there is a two second break in the tape. However, the most serious questions arises in that a date a time flashes on the tape. The incident from which the Defendant is charged alleged occurred on February 1, 1993, however the date that flashes on the screen is March 10, 1993. Furthermore, there are two different times that flash on the screen, 1:36 p.m. and 4:10 p.m., Considering all of the questions about the tape

that have arisen, it would be prejudicial to the Defendant to have this tape played at trial and the Defendant asks that the tape be suppressed.

Respectfully submitted,

/s/ _____

Alec G. Stone

HARDIN CIRCUIT COURT

DIVISION II

Criminal File No. 93-CR-127

COMMONWEALTH OF KENTUCKY - - - - - - *Plaintiff*

v.

MARIA VERGARA - - - - - - - - - - *Defendant*

MOTION TO SUPPRESS

Please take notice that the Defendant, by and through counsel, will on Tuesday, October 19, 1993, at 9:00 a.m. or as soon thereafter as counsel can be heard, appear before the Hardin Circuit Court, Division II, at the Hardin County Courthouse, Elizabethtown, Kentucky, and make the following motion.

MOTION

Comes the Defendant, by and through counsel, and moves the Court to suppress the videotape that allegedly shows the Defendant taking money from the cash drawer. This motion is based upon the memorandum attached hereto and incorporated by reference the same as if fully copied herein.

The Defendant requests a hearing on this matter in conformance with the rules of this Honorable Court.

/s/ _____

ALEC G. STONE
820 High Street, P.O. Box 487
Brandenburg, Kentucky 40108
(502) 422-3900
Counsel for Defendant

CERTIFICATION

This is to certify that a true and correct copy of the foregoing was hand-delivered this the 12th day of October, 1993, to Hon. Jeff England, Commonwealth Attorney, Elizabethtown, Kentucky.

/s/ _____
Alec G. Stone